

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE**

IN RE:	(Bankruptcy No. 99-4110 through
Just for Feet, Inc., et al.,	(99-4117
	((jointly administered)
Debtors	(Chapter 7
	(
	(
Charles R. Goldstein,	(Adversary No. 01-08306 (JKF)
Chapter 7 Trustee	(
	(
Plaintiff,	(
	(
v.	(
	(
K-Swiss, Inc.	(
	(
Defendant	(

Appearances:

John T. Carroll III, Esquire,	Martin T. Fletcher, Esquire for Plaintiff Charles R.
Goldstein, Chapter 7 Trustee	
Joseph Grey, Esquire,	Mitchell A. Karlan, Esquire for Defendant K-Swiss, Inc.

RECOMMENDATION AND ORDER

The Chapter 7 Trustee filed a complaint against Defendant K-Swiss Inc. to avoid preferential transfers and to recover property pursuant to 11 U.S.C. § 547. In response, K-Swiss, Inc., filed three pleadings: (1) Answer and Jury Trial Demand; (2) Motion for Determination of Core Status; and (3) Motion to Withdraw the Reference to the Bankruptcy Court. The parties agree and the court finds that this avoidance action is a core proceeding pursuant to 28 U.S.C. § 157(b)(2)(F). Thus, the court will address the Jury Trial Demand, the Chapter 7 Trustee's motion to strike the jury trial demand, and the Motion to Withdraw the Reference.

I. Jury Trial Demand

The U.S. Supreme Court has held that “a creditor’s right to a jury trial on a bankruptcy trustee’s preference claim depends upon whether the creditor has submitted a claim against the estate.” Langenkamp v. Culp, 498 U.S. 42, 45 (1990), rehearing denied, 498 U.S. 1043 (1990), quoting Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 58 (1989). Specifically, if a creditor files claims against the bankruptcy estate and is then met with a preference action from the trustee, that action becomes part of the claims allowance process which is triable only in equity. Langenkamp v. Culp, 498 U.S. at 44. Thus, there is no Seventh Amendment right to a jury trial. Id. If, however, the creditor has not filed a claim against the debtor’s estate, the creditor is entitled to a jury trial on the issue of whether the payments constituted an avoidable preference. Id. This exception is intended for individuals who have not filed claims but from whom the trustee seeks to recover an allegedly fraudulent or preferential transfer.

Similarly, the Third Circuit Court of Appeals has held that by submitting a proof of claim to the debtor’s estate, the creditors effectively waive their right to a jury trial and instead submit themselves to the equitable jurisdiction of the bankruptcy court. See Billing v. Ravin, Greenberg & Zackin, P.A., 22 F.3d 1242 (3d. Cir.), *cert. denied* 513 U.S. 999 (1994); Travellers International AG v. Robinson, 982 F.2d 96, 98 (3d. Cir. 1992), *cert. denied* 507 U.S. 1051 (1993). A creditor who files a proof of claim against the bankruptcy estate “triggers the process of ‘allowance and disallowance of claims’, thereby subjecting himself to the bankruptcy court’s equitable power”. In re Heater, 261 B.R. 145, 148 (Bankr.W.D.Pa. 2001), quoting Langenkamp, 498 U.S. at 44. In other words, if that creditor later becomes a

defendant in a preference action in which it would normally have a right to a jury trial, that action becomes part of the claims allowance process and is triable only in equity. In re Heater, 261 B.R. at 148. If, however, the creditor against whom the preference action is brought has not filed a proof of claim, the preference action “amounts only to a legal action to recover a monetary transfer.” Id. In this situation, the creditor retains the right to a jury trial. Id.

Because K-Swiss, Inc., has not filed a claim against the estate, it is entitled to a jury trial in this avoidance action. If, however, K-Swiss had filed a claim, it would not be entitled to a jury trial. Therefore, this court holds that Defendant K-Swiss, Inc., is entitled to a jury trial in this avoidance action only because it has not filed a claim against the estate.

II. Motion of Plaintiff to Strike

For the reasons expressed above, the Chapter 7 Trustee’s motion to strike K-Swiss, Inc.’s jury trial demand is denied.

III. Motion to Withdraw the Reference to the Bankruptcy Court

Pursuant to 28 U.S.C. § 157(d), “[t]he district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown.” Both parties agree that the motion was timely filed. Furthermore, even the Chapter 7 Trustee in his Response in Opposition to the Motion of the Defendant to Withdraw the Reference to the Bankruptcy Court correctly asserts that most courts have held that the right to a jury trial constitutes sufficient cause for withdrawal of the reference. See In re Kenai Corp., 136 B.R. 59, 61 (S.D.N.Y. 1992). Therefore, because Defendant K-Swiss, Inc., is entitled to a jury trial in this avoidance action as it has not

submitted a claim against the estate, the Motion to Withdraw the Reference to the Bankruptcy Court should be granted.

IV. Conclusion

For the foregoing reasons, Defendant is entitled to a jury trial and the reference should be withdrawn. An appropriate recommendation to the District Court will be entered.

DATE:

Judith K. Fitzgerald
U.S. Bankruptcy Judge

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Plaintiff,	(
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v.	(
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K-Swiss, Inc.	(
	(
Defendant	(

ORDER AND RECOMMENDATION

AND NOW, this _____ day of **April, 2002**, for the reasons expressed in the foregoing Memorandum Opinion, it is **ORDERED, ADJUDGED, and DECREED** that Defendant K-Swiss, Inc. is entitled to a jury trial in this avoidance action as it has not filed a claim against the estate.

It is **FURTHER ORDERED** that the Chapter 7 Trustee's motion to strike the demand for jury trial is **DENIED**.

It is **FURTHER ORDERED** that the Clerk shall forthwith transmit the motion to withdraw the reference to the District Court.

Further, it is **RECOMMENDED** that the District Court grant the motion to withdraw the reference.

Judith K. Fitzgerald
U.S. Bankruptcy Judge

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